

Payments in Foreign Currency and Exchange Rate Fluctuations: From the Perspective of East Asian Countries

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I . Introduction

II . Foreign currency in East Asian countries

III . Case law in Japan

IV . The right of choice of currency claims of the obligee

V . Recognition and enforcement of foreign judgments and exchange rate
fluctuations

VI . Remarks

I . Introduction

In East Asia, including Taiwan and Japan, although there are operational transactions and exchanges between countries, their currencies are not unified. Within each country's sovereignty, the country's currency is the only one with legal validity. Referring to Europe, with the regionally

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unified EURO, the Asian Development Bank has demonstrated the concept of unifying the currencies of East Asian countries through the Asian Currency Unit (“ACU”). The feasibility of its implementation has been studied¹, but there is no prospect of the ACU being issued in the near future.

Under such circumstances, for example, in transactions between Taiwanese and Japanese companies, it will be necessary to decide which currency to use when issuing payments in the fulfillment of a contract.

Currently, to aim for better international trade development in East Asian countries, it can be meaningful to understand the legal aspects concerning payments in foreign currencies in each country. Regarding the discussion about the recent revisions to the Japanese Civil Code (“JCC”),² there was a movement to amend Article 403 of the JCC on regulations pertaining to foreign currency payments. In the Public Comment system that recorded the widely dissenting opinions after the publication of the interim draft (“Chûkan-Shian”)³ for a revision of the JCC, both the pros and cons were presented for the amendment of Article 403. Ultimately, the amendment of the article was postponed, although various opinions on the domestic treatment of foreign currencies were offered. Regarding recent

1 Shingo Watanabe, Masanobu Ogura, *Asia Tsûkantan-i kara Tsûkadômei madeha Tôimichika* (Is Incorporation of the Asian Currency Unit in a Currency Alliance Far Off), *Nichigin Workpapers* (2006), available at: https://www.boj.or.jp/research/wps_rev/wps_2006/data/wp06j21.pdf

2 The Japanese Ministry of Justice offers an English summary of all deliberations about this Civil Code reform (available at http://www.moj.go.jp/ENGLISH/ccr/CCR_00001.html).

3 Homushô Minjikyoku Sanjikanshitsu, *Minpou (Sikenkankei) no Kaisei nikansuru Chûkan-Shian* (the interim draft on amendments to the Civil Code (Obligation law), 2013 (available at <http://www.moj.go.jp/content/000108853.pdf>).

Japanese cases, we discuss whether fluctuations in exchange rates could be considered when recognizing and executing a foreign judgment involving payment in a foreign currency in Japan.

First, we describe the East Asian legal system that applies to this issue. After that, by introducing and analyzing the aforementioned civil law revision and relevant cases, we discuss the present status in Japan of payments in foreign currencies.

II. Foreign currency in East Asian countries

Article 202 of the Civil Law of Taiwan is a provision on payments in foreign currency; it states, “When the amount of the claim is specified in foreign currency, the obligator may pay in the legislative currency of the Republic of China using the market price of the place of payment at the time of payment. Provided, however, that, this shall not apply where there are agreements between parties.” This provision allows payment only to the obligator in Taiwan dollars at the time of payment even if the amount of the claim is indicated in foreign currency. In other words, this Article is a provision that provides only obligators with the option of choosing a currency for payment.

Turning to other countries and regions in East Asia,⁴ while there is no such provision in the Civil Code of Mainland China, there are some cases that have allowed parties to pay in a foreign currency if a prior agreement has been made.⁵ In Hong Kong, claims and judgments in foreign currencies

4 For an East Asian law comparison, see Alejandro Carballo Leyda (ed.), *Asian Conflict of Laws—East and Southeast Asia*, Walters Kluwer 2015.

5 Yongping Xiao, Wenwen Liang, “Mainland China,” in: Leyda (ed.), *supra* note (4), p.27.

are allowed.⁶ In Macao, payment in a foreign currency by agreement is permitted. According to Article 555(1) of the Macao Civil Code, the obligee has to claim in a foreign currency, while the obligor can choose to pay in either a foreign or domestic currency.⁷ Therefore, the situation is the same as that outlined in Taiwan's law. In South Korea, according to Article 337(1) of the Korea Civil Code, payment in foreign currency is permitted if the parties have agreed to it. However, in raising an action, for the convenience of the court, the obligees need to record the Korean won calculated at the current rate for certain transactions, such as stamp fees or derivative legally generated fees.⁸ In Japan, the JCC⁹ grants payments in foreign currency under paragraph 3 of Article 402.¹⁰ Moreover, Article 403 provides the following: "When the amount of the claim is specified in the currency of a foreign state, the obligor may make the payment in the legal currency of Japan using the foreign exchange rate current in the place of the performance."

6 Alan Gibb, Richard Morris, "Hong Kong," in: Leyda (ed.), *supra* note (4), p.46.

7 Jorge Menezes, "Macau," in: Leyda (ed.), *supra* note (4), p.124.

8 Young Seok Lee, Sae Youn Kim, Sy Nae Kim, "Republic Korea," in: Leyda (ed.), *supra* note (4), p.106.

9 The English translation of JCC is available at <http://www.moj.go.jp/content/000056024.pdf>

10 Article 402 of JCC

(1) If the subject of the claim is money, the obligor may, at his/her choice, make the payment in currency of any kind; provided, however, that, this shall not apply to the cases where the delivery of specific kind of currency is identified as the subject of the claim.

(2) If the specific kind of currency that is the subject of the claim is no longer in mandatory circulation at the time of the payment, the obligor must make payment in other currency.

(3) The provisions of the preceding two paragraphs shall apply *mutatis mutandis* to the cases where the delivery of the currency of a foreign state is the subject of the claim.

Thus, the laws of the countries mentioned above do not prohibit payments in foreign currency. However, there are differences in each country regarding the provisions that grant priority to payment in the currency of the country where the payment takes place (as in Korean law). Taiwanese law, Korean law, and Japanese law have provisions about the exchange rate, but a concrete time is specified in the legal text in Taiwanese law only.

Thus, the issue of whether to grant obligees the choice of which currency to claim, and, the issue of when to fix the exchange rate is left to interpretation. Since it is beyond our capacity to consider the interpretations of each country, in this paper, we approach the core of the problem with these interpretations by introducing and analyzing Japanese case law. As mentioned below, there are many criticisms about the interpretations of these problems in Japan. Therefore, this analysis may become a reference for legislative suggestions and legal interpretations in other countries with similar provisions.

After introducing the Supreme Court ruling in 1975, which is the leading case for the problems noted above, we examine the rights of obligee and obligees in choosing which currency to use and the fixed time of the exchange rate for a foreign currency claim indicated by the judgment.

III. Case law in Japan

(1) Supreme Court judgment on July 15, 1975 (“1975 judgment”)¹¹

Fact: X (Ryukyus Bank, located in Okinawa before the return of

11 *Minshu* 29(6), p.1029. English translation of this judgment, *Japanese Annual of International law* 20(1976), p.88.

administrative rights over Okinawa to Japan, filed an action in 1968) has demanded \$250,000 from Y (a company in Nagoya). The basis of the claim is a contract of guarantee concerning the loan from X to corporation A that Y established in Okinawa. X asked Y for the payment of 90 million yen converted at a rate of 360 yen per dollar, which was the official rate at the time of the appeal (\$250,000). The right of choice of currency claims of the obligee and—if accepted—the date of conversion of the exchange rate were regarded as problems to be considered. As stated below, the court approved the rights of the obligee, X, and mentioned the conversion time of the exchange rate.

The court stated:

“Monetary claims specifying amounts in foreign currencies are “discretionary claims.” Therefore, an obligee may demand the payment from an obligator in either foreign currency or Japanese currency. Article 403 of JCC stipulates only that obligators can make payment in Japanese currency, even if the obligee demands payment in foreign currency.”¹²

“If the obligators pay monetary debts specified in amounts with foreign currency in Japanese currency, the currency conversion from the foreign currency amount into the Japanese currency amount should be based on the exchange rate obtained at the time of the actual payment. Specifically, if the court judges a monetary claim specified in amounts with foreign currency in Japanese currency, the court should convert it according to the exchange rate obtained

¹² *Minshu (Id.)* p.1032.

on the date of the final hearing in the proceedings involving fact-finding.”¹³

(2) The significance of the judgment

The first point regarding the significance of this judgment is that the court allows obligees to make claims either in domestic or foreign currency (“right of choice of currency claims of the obligee”). The rationale is that the claims denominated in foreign currencies are only discretionary claims, and so, payments in domestic currency are not excluded.

The second point is that the conversion time for the exchange rate is the payment date; in the case of a judgment, the date should be read as the date of the final hearing in the proceedings. In the 1975 Judgment, a fixed exchange rate system of 306 yen per dollar was used (date of the final hearing: December 18, 1971), but the floating exchange rate system was adopted for the Supreme Court’s judgment date.

IV. The right of choice of currency claims of the obligee

For the right of choice of currency claims of the obligee, a few authors agree with the 1975 judgment based on their belief that obligees and obligators should have recourse to similar choices,¹⁴ but many authors are

13 *Minshu (Id.)* pp.1032-1033.

14 Kazunori Ishiguro, *Kinyūtorihiki to Kokusaisoshō (Financial Transaction and Private International Law)*, (Yūhikaku 1983), p.174. Other views that agree with the judgment: Momoji Tao, Comment on 1975 Judgment, *Saikousaibansho Hanreikaisetsu Minzihen Showa 50 nendo*, 1975, p.325; Tōru Tanaka, Comment on 1975 Judgment, Sueo Ikehara (ed.), *Shōgai Hanrei Hyakusen Zouhoban (Case book of transnational law Augmented version)*, (Yuhikaku 1976), p.232.

critical of the judgment.¹⁵ Those who are critical emphasize that JCC's Article 403 recognizes substitute claim rights only for obligators from the viewpoint of protection of convenience regarding payments. They argue that similar rights for obligees are rejected in order to realize this protection.¹⁶ In addition, they point to the consideration of foreign currency as a discretionary claim, stating that there is no reason for the difference between domestic currency and foreign currency to exist.¹⁷

In practice, however, the case law is established and has been followed by the lower courts.¹⁸ Under these circumstances, at the time of formulating the Chûkan-Shian of the recent JCC revision mentioned above, discussions took place to revise the doctrine of this decision using legislation. In Chûkan-Shian, a plan to amend Article 403 of the JCC was submitted as follows:

15 Isoya Suzuki, Comment on 1975 Judgment, 613 *jurisuto*, 1976, p.121; Kiyoshi Igarashi, Comment on 1975 Judgment, *Shôwa 51 nendo jûyôhanreikaisetsu (Explanation of important cases—FY 1976 version)*, 1976, p.90; Yoshihiro Makise, Comment on 1975 Judgment, *Hanrei taimuzu*, No 333(1976), p.94; Fukashi Miyagawa, Comment on 1975 Judgment, *Tanpohô no hanrei II (Cases regarding mortgage II)*, 1994, p.211; Masato Dôgauchi, Comment on 1975 Judgment, Yoshiaki Sakurada, Masato Dôgauchi (ed), *Kokusaisihô Hanrei Hyakusen-Shinpo taiô hoseiban (Case book of private international law)*, (Yuhikaku 2007) p.92; Takuya Shima, Comment on 1975 Judgment, Yoshiaki Sakurada, Masato Dôgauchi (ed), *Kokusaisihô Hanrei Hyakusen-dai 2 Han (Case book of private international law 2nd edition)*, (Yuhikaku 2012), p.100; Kunihiro Morishita, Kokusai Kessai (International Settlement), Masato Dôgauchi, Yoshimasa Furuta (ed), *Jitsumu ni kiku Kokusai Bijinesu Hanrei Seisen (Case book of international business case effective for practice)*, (Yuhikaku 2015), p.108, etc.

16 Igarashi, *supra* note (15), p.90.

17 For the summary of the evaluation of this judgment, Yoshiaki Sakurada, Masato Dôgauchi (ed.), *Chushaku Kokusai Shiho (Commentary on Private International Law)*, Vol. 1 (Yuhikaku, 2011), p.661 (Tetsurô Morishita).

18 As examples of recent cases, Tokyo High Court, February 28, 2013, *Hanrei Taimuzu* No. 1414, p.181; Tokyo High Court, October 29, 2014, *Hanrei Jihô* No. 2239, 23.

No. 8 Subject of claims in Chûkan-Shian

“Foreign Currency Claims (Relating to Article 403 of Civil Code)

... the provisions of Article 403 of the Civil Code shall be amended as follows.

(1) When parties have specified monetary claim amounts with foreign currency, unless another intention is manifested, the obligators shall make the payment in the foreign currency.

(2) When parties have specified monetary claims amounts with foreign currency, unless another intention is manifested, the obligee shall request the obligator to make the payment only in the foreign currency.”¹⁹

In the above draft, attention should be paid to the second paragraph. This paragraph considers that the obligee has no option if there is an agreement on payment in foreign currency. The explanation of the draft demonstrates that if the amount of the claim is specified in a foreign currency, it is the reasonable intention of the party to receive the claim only in that currency unless there is a special agreement.²⁰

Opinions via the Public Comment system on this draft have been made

19 Homushô Minjikyoku Sanjikanshitsu, *supra* note (3) p.32-33.

20 *Supplementary explanation for Chûkan-Shian* explains, “In text (2), if the amount of the claim is specified in foreign currency, the obligee can claim the performance only in the designated foreign currency, unless another intention is manifested. The 1975 Judgment asserts that obligees can demand obligators to pay in Japanese currency at the exchange rate obtained at the time of the actual payment even if they designate a claim amount in foreign currency. However, when parties have specified monetary claim amounts with foreign currency, it is the reasonable intention of the parties to assume that payment is made only with that currency unless there is a special contract. We established provisions that are different from this case law.” Homushô Minjikyoku Sanjikanshitsu, *Minpou (Sikenkankei) no Kaisei nikansuru Chûkan-Shian no Hosokusetumei (Supplementary explanation for the interim draft about amendment to Civil Code (Obligation law))*, 2013, p.93: available at <http://www.moj.go.jp/content/000109950.pdf>

freely available. For the proposed amendment to Article 403, there have been a number of approvals and oppositions from academic circles, legal circles, and so on.²¹ Ultimately, after Public Comment, no deliberation was made on this article; therefore, the interpretation based on the 1975 judgment of Civil Code 403 must be maintained in the future.

Here, we will consider whether the provision of this draft was internationally standardized and corresponds to Article 6.1.9 of “UNIDROIT Principles of International Commercial Contracts (UPICC) 2010”²² formulated by UNIDROIT, which is one of the most famous international organizations engaging in unification in the field of international trade law.²³

Article 6.1.9 of UPICC (Currency of payment)

(1) If a monetary obligation is expressed in a currency other than that of the place for payment, it may be paid by the obligor in the currency of the place for payment unless

(a) that currency is not freely convertible; or

21 See, “*Minpou (Saikenkankei) no Kaisei nikansuru Chûkan-Shian*” ni taishite yoserareta Iken no Gaiyô (*Summary of opinions on the interim draft about amendment to Civil Code (Obligation law)*): available at, <http://www.moj.go.jp/content/000119456.pdf>

Judging from only the number of opinions and organizations posted there, more than half agree with the revised text of Article 403 of the JCC. In addition, the Supreme Court in Japan offered the following opinion as a matter concerning the rule of payment in foreign currency in principle. “In the compulsory execution proceedings based on the judgment to uphold a claim amount with foreign currency, it is doubtful whether liquidating distribution converted with yen is possible. To clarify that, it is necessary to take measures including some measure under the civil execution law.”

22 This was the latest version at the time Chûkan-Shian was formulated in 2013. Thereafter, UPICC (2016) was published, but Article 6.1.9 has not been changed. Text and commentary of the 2016 version are available at: <https://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf>

23 cf.) http://www.law.nagoya-u.ac.jp/unidroit_nagoya.html

(b) the parties have agreed that payment should be made only in the currency in which the monetary obligation is expressed.

(2) If it is impossible for the obligor to make payment in the currency in which the monetary obligation is expressed, the obligee may require payment in the currency of the place for payment, even in the case referred to in paragraph (1) (b).

(3) Payment in the currency of the place for payment is to be made according to the applicable rate of exchange prevailing there when payment is due.

(4) However, if the obligor has not paid at the time when payment is due, the obligee may require payment according to the applicable rate of exchange prevailing either when payment is due or at the time of actual payment.

The same provisions exist for the 2002 Principles of European Contract Law (PECL)²⁴ by the Commission on European Contract Law.²⁵

From these provisions in international instruments, in principle, only the obligator can choose between foreign currency and domestic currency; the obligee is granted the option of selection, as an exception, only when the obligor delays payment. International common standards regarding this issue do not unconditionally grant the selection rights to obligees.

24 Article 7:108 of PECL: Currency of Payment

(1) The parties may agree that payment shall be made only in a specified currency.

(2) In the absence of such agreement, a sum of money expressed in a currency other than that of the place where payment is due may be paid in the currency of that place according to the rate of exchange prevailing there at the time when payment is due.

(3) If, in a case falling within the preceding paragraph, the obligator has not paid at the time when payment is due, the obligee may require payment in the currency of the place where payment is due according to the rate of exchange prevailing there either at the time when payment is due or at the time of actual payment.

25 For the relationship between the two principles, see Ole Lando, "Principles of European Contract Law and UNIDROIT Principles: Moving from Harmonisation to Unification?" 8 *Unif. L. Rev.* p. 123 (2003).

Therefore, it is time to reconsider the 1975 judgment.

We postponed the amendment of Article 403 of the JCC, but it is questionable whether the conclusion was appropriate from the viewpoint of opinions indicated via the Public Comment system, the above criticism of the 1975 judgment,²⁶ and the fact that it is a suitable international common standard.²⁷

V. Recognition and enforcement of foreign judgments and exchange rate fluctuations

There were few objections to the second point of the judgment regarding the standard time of currency exchange fluctuation as the performance date in principle.²⁸ With the 1975 judgment, the contents of this lawsuit are simply requesting a claim. Similarly, in another litigation form such as procedures for the recognition and enforcement of foreign judgments, the date of conversion of foreign currency has significance. In addition, the 1975 judgment ordered the obligator payment as a lump sum. Of course, in addition to lump-sum payments, the main sentences of judgments, such as continuous payments or periodic payments (e.g., monthly payments), are also accepted. Does the scope of the 1975 judgment extend to another procedure and compensate for periodic payments? This

26 See, K. Morishita *supra* note (15) p.112.

27 See, Hidenori Hirano, Saiken Kaisei Chûkan-Shian ni okeru Gaika Saiken no Toriatukai(Deal with Foreign Currency Obligations in Interim Draft of Revision for Law of Obligations), 19 *Kokusai Shôtōrihiki Gakkai Nenpou(Journal of Academy for International Business Transactions)*, 2017, pp.107.

28 See, Skurada, Dôgauchi, *supra* note (17) p.662 (T. Morishita).

question has not been consciously discussed.²⁹

However, under these circumstances, recent rulings have brought up questions regarding the execution of foreign judgments for payments of support.³⁰ In these cases, the execution of judgments on the premise of US dollar payment was required in Japan. Disputes between parties have arisen in cases when the exchange rate at the time of filing a lawsuit for the enforcement of a judgment or a final hearing in the proceedings had greatly fluctuated since the handing down of a foreign judgment. Due to fluctuation, for example, an obligator incurred an excessive economic burden, considered an infringement of the right to be protected by the public order prescribed in Article 118 of the Code of Civil Procedure of Japan.³¹ In this case, fluctuation in the exchange rate occurred about 1.5 times; although the court recognized this value, it stated that it would not be a breach of public order because, even if the support obligator had to make the payment in Japanese currency, the amount was not high for the support obligator and they could afford to make the payment.

Unfortunately, there is no mention in the 1975 judgment about the

29 It is debatable whether Article 403 of the JCC is applicable to claims indicated with foreign currency after procedures regarding recognition and enforcement of foreign judgment are performed and when the obligator makes the payment. For an opinion that Article 403 is dominated by *lex fori*, see Shunichiro Nakano, *Gaikoku Hanketsu no Sikkô* (Enforcement of foreign judgment), Koji Shindô, Hiroshi Takahashi, Katô Shintarô (ed.), *Jitsumu Minzi Soshôho Kouza -dai 3 ki-(Course of Practical civil procedural law—The third term—)*, Vol. 6 (Nihonhyoronsha 2013) p.457.

30 Tokyo High Court, May 20, 2015, *Westlaw Japan* (2015WLJPCA05206001). See also Tokyo District Court, December 25, 2014, *Hanrei Taimuzu* No 1420, p 312 (first trial in the above High court judgment).

31 For the recognition system of foreign judgment in Japan, see Nozomi Tada, “Enforcement of Foreign Judgments in Japan Regarding Business Activities,” *Japanese Annual of International Law* 46(2003), p.75.

reference time of the exchange rate in judging whether a foreign judgment is contrary to public order. However, from the logic of this judgment, we propose that it should be based on when it is needed in the proceedings of the lawsuit. Based on this understanding, whether or not a foreign judgment violates a public order should be judged by the exchange rate at the time of the examination.³²

However, is this logic desirable for obligees (support rights- holders)? The logic may lead to the consequence that if the amount converted in Japanese yen is high, they cannot accept the support. In other words, their support will be deprived by the circumstances unrelated to the parties such as the exchange rate. Furthermore, when executing periodic payment judgments on a continuous basis, if they cannot be executed using foreign currency, they will be converted into Japanese currency. Is it reasonable to convert every payment?

What we demonstrated in our study is that, when focusing on procedures for enforcing foreign judgments ordering compensation for periodic payments, despite the 1975 judgment, the issue of exchange rates in cases of private international law is worth discussing again. At present, I am skeptical of judging the exchange rate in the framework of a public order. Rather, I believe that it is desirable to solve the currency fluctuation problem by changing the judgment as a matter of changing circumstances. As for the possibility that fluctuations in exchange rates may harm continuous enforcement since at present it is difficult to enforce payments in foreign currency completely,³³ we should respond with a

32 Manabu Iwamoto, Comment on 2015 judgment (*supra* note (29)), 1509 *Jurisuto*, 2017, 130.

33 See the opinion of the Supreme Court on Chûkan-Shian, *supra* note (21).

new amendment. For example, in the case of enforcement of a continuous payment based on the maintenance order pronounced in a foreign country, British law requires that payments be converted into its currency according to the exchange rate at the time of recognition of the judgment.³⁴ This rule is helpful for us.

VI. Remarks

This paper provides an analysis of the foreign currency payments in Japan; although the country has the same regulations as those of other East Asian countries, they have been modified by the Japanese Supreme Court. Although it is not clearly written in the JCC text, it was confirmed that the right of choice of currency claims of the obligee would be maintained in Japan in the future. However, although the enactment of the amendment has been postponed, it must not be overlooked that many scholars criticized the 1975 Judgment that produced it. Certainly, the method of the judgment that the exchange rate should be that of the place of payment at the time of payment will be appropriate in most cases. However, it was demonstrated that this method is not necessarily the best choice for claims related to periodic payments, as illustrated in section V. In particular, the appropriate treatment should be examined in the case of excessive burdens placed on vulnerable people because of currency fluctuations.

34 §8 of Civil Jurisdiction and Judgments Act 1982: Currency of payment under registered maintenance orders.

(2) Where the order is expressed in any other currency, the amounts shall be converted on the basis of the exchange rate prevailing on the date of registration of the order.

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